

[\*1]

<b>Lian Wu Shao v Tianji Li</b>
2013 NY Slip Op 51079(U)
Decided on July 9, 2013
Supreme Court, New York County
Ramos, J.
Published by <u>New York State Law Reporting Bureau</u> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on July 9, 2013

**Supreme Court, New York County**

<p><b>Lian Wu Shao, Plaintiff,</b></p> <p><b>against</b></p> <p><b>Tianji Li, NEW WORLD MALL (NY) LLC, SAM CHANG, NWM MEMBER LLC, and NEW WORLD MALL, LLC,</b></p> <p><b>Defendants.</b></p>
--

651886/2011

Plaintiff

Mark C. Zauderer, Esq.

Andrew Hope, Esq.

Fleming Zulack Williamson Zauderer LLP

One Liberty Plaza

NY, NY 10006

Defendant Tianji Li, New World Mall (NY) LLC, and New World Mall LLC

Peter M. Ripin, Esq.

605 Third Ave

NY, NY 10158

Defendants Sam Chang and NWM Member LLC

James Thomas Murphy, Esq.

40 Woodbine Court

Floral Park, NY 11001

Charles E. Ramos, J.

In motion sequence 003, the plaintiff Lian Wu Shao ("Shao") moves pursuant to CPLR 3212 for partial summary judgment on his first cause of action for breach of contract and his eleventh cause of action for declaratory judgment against the defendants Tianji Li ("Li"), New World Mall (NY) LLC, Sam Chang ("Chang"), NWM Member LLC ("NWM Member, together with Chang, "NWM"), and New World Mall, LLC ("New World Mall") as alleged in the [\*2]amended verified complaint (the "Complaint").

### **Background** <sup>[FN1]</sup>

Chang, Li, and Shao (collectively, the "Members") were partners in New World Mall, a New York limited liability company ("LLC") formed for the purpose of purchasing, developing, leasing, and operating a mall in Flushing, New York.

Chang owned a 50.1% interest in New World Mall with the remaining 49.9% interest being owned by Exceli-Star Development LLC ("Exceli"). Shao and Li each owned a 47.5% interest in Exceli with the remaining 5% interest being owned by Yung Hsing "Jimmy" Chou ("Chou").<sup>[FN2]</sup> In effect, Shao and Li each owned a 23.7% interest in New World.

On February 16, 2009, the partners memorialized their rights and obligations in an Amended and Restated Operating Agreement (the "Operating Agreement"). The Operating Agreement provided that a super majority vote of 75% of the membership interests was required for a broad range of ownership decisions (Shao Aff., Ex. A, pp. 4-7).

Furthermore, the Operating Agreement contained a provision that provides that "[e]xcept as set forth in this Agreement, no Member shall gift, sell, assign, pledge, hypothecate, exchange or otherwise transfer to another person any portion of a Membership Interest" (the "Transferability Provision") (*id.* at 13).

Moreover, the Operating Agreement provides that a member selling their interest must provide notice of a bona fide offer to the other members and that each non-selling member has a right of first refusal with respect to the sale of any membership interest in New World (*id.*).

On December 8, 2010, a meeting was held between the Members and their respective counsel. During the meeting, Li expressed the desire to dissolve Exceli and transfer the New World Mall membership interests to Shao and Chou directly, and to Chang's own wholly-owned LLC, NWM Member. Shao agreed, and the membership interests were restructured resulting in NWM Member, owning 50.1%, Shao and Li each owning 23.7%, and Chou owning 2.5% of New World Mall.

In furtherance of the restructuring, the Members executed a second amended and restated operating agreement (the "Amended Agreement"). In addition to restructuring the membership interests, other provisions were amended as well.

Specifically, the Members agreed to reduce the super majority vote of the membership interests required for ownership decisions from 75% to 73% (*id.*, Ex. G, pp. 4, 5, 7-8).

In addition, the Transferability Provision was amended to permit pledging a membership interest, providing that "[e]xcept [\*3]as set forth in this Agreement, no Member shall gift, sell, exchange or otherwise transfer to another person any portion of a Membership Interest. Nothing contained herein shall be deemed to prohibit a Member from pledging his Membership Interest" (*id.* at 13).

Concurrently, on December 8, 2010, Chang NWM and Li entered into an agreement,

whereby NWM and Chang irrevocably assigned to Li all rights and benefits arising from the New World Mall membership interest including, but not limited to, the managing and voting rights, the rights to profits, and the right to a return of their capital contributions, in exchange, Li agreed to pay Chang \$ 1.52 million, as return of Chang's capital contribution, and an additional \$50,000 per month during the term of the assignment (the "Assignment"). The term of the Assignment lasts until the expiration of the lease for the mall itself, including any future renewal lease periods. Currently, the mall's lease term expires on January 30, 2027, with a ten year renewal.

Furthermore, the Assignment contemplates the simultaneous execution of an irrevocable proxy, a power of attorney, and a manager authorization agreement by NWM (the "Transfer Documents"), which authorizes Li to make "any and all necessary decisions" that NWM "would otherwise be empowered to make" (Shao Aff., Exs. C, pp. 3-4; D; E; F).

On May 25, 2011, following the execution of the Second Agreement and the Transfer Documents, Shao was removed as manager of New World Mall.

Thereafter, Shao commenced this action alleging, *inter alia*, causes of actions for breaches of the Amended Agreement, breaches of fiduciary duty, and fraudulent inducement.

### **Discussion**

As a preliminary matter, this Court has not determined that the execution of the Amended Agreement by Shao was fraudulently induced and as a result, the Court must presume that the Second Agreement is currently valid and binding for the purposes of this motion for summary judgment.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Shao seeks summary judgment on his first and eleventh causes of action arguing that

the Assignment is effectively a prohibited transfer under the Amended Agreement.

"An assignment is a transfer or setting over of property, or [\*4]of some right or interest therein, from one person to another, and unless in some way qualified, it is properly the transfer of one whole interest in an estate, or chattel, or other thing" (*In re Stralem*, 303 AD2d 120, 122 [2d Dept 2003]).The language of the Assignment provides that NWM and Chang:

"hereby irrevocably assign to [Li] and [Li] hereby accepts any and all of the rights and benefits resulting from or associated with the Subject Membership Interests including, but not limited to [the] right to receive profits, dividends, distribution or any other form of income or distribution from [New World Mall], the right to receive the return of capital contributions in the amount of [\$ 1.52 million] from [New World Mall], the right to vote the Subject Membership Interests, the right to make any and all management decisions on behalf of [NWM] as a manager and the right to vote any and all managerial votes allocated to the Subject Membership Interest and or [Chang] under the Operating Agreement of [New World Mall] and/or amendments or restatements thereto" (Exhibit C, § 2.1).

Based on the above, NWM and Li clearly executed an unqualified assignment that resulted in a transfer of a portion of NWM's membership interest.

As a result, the Assignment functions not as an assignment of collateral for security or a pledge of NWM's membership interest, as intended by NWM and Li, instead it functions as a general assignment that results in a transfer of a portion of NWM's membership interest in breach of the Amended Agreement.

NWM and Li's attempt to circumvent the Transferability Provision by pledging NWM's membership interest fails as a matter of law.

The Assignment provides that NWM is pledging its New World membership interest as collateral "to secure the full and prompt payment and performance of all of NWM's obligations under [the Assignment]" (Shao Aff., Ex. C, § 2.5).

The Assignment provides, *inter alia*, that NWM and Chang "shall defend the title to the Collateral against all claims and demands whatsoever...and shall pay all taxes, assessments and fees relating to the Collateral" (*id.*).

It is well established that a pledge is a "bailment of personal property as security for some debt or engagement" (Bank of Rochester v Jones, 4 NY 497, 507 [1851]).

However, as far as this Court can determine, except for preserving the collateral, there are no substantive obligations owed by NWM that are being secured by the pledge of its membership interest. Thus, NWM's pledge would end upon the termination of the Assignment because there is no obligation to be satisfied that would result in the return of its membership interest. [\*5]

Thus, while pledging a membership interest is permitted under the Amended Agreement, NWM's pledge is improper because it fails to secure an obligation, debt, or engagement.

Moreover, the termination provisions of the Assignment provide that upon Li's uncured default, "NWM is entitled to revoke any [of the Transfer Documents]..." (*id.* at § 10). But, in the event that Chang revokes the Transfer Documents, the Assignment does not provide that the Assignment becomes void or is terminated, rather, the membership rights remain assigned to Li.

Finally, it is unclear to this Court what purposes, if any, the Transfer Documents serve, since Li as the assignee of the membership interest already has the authority to vote for, and the right to manage NWM, conferred by the Transfer Documents as a result of being the assignee. "When an valid assignment is made, the assignee steps into the assignor's shoes and acquires whatever rights the latter had" (*In re Stralem*, 303 AD2d 120, 123 [2d Dept 2003]).

In opposition, Chang and Li assert that Shao was fully aware of and consented to the amendments in the Amended Agreement. Furthermore, they allege that the removal of Shao was in the best interests of New World Mall. Those facts, even if true, are insufficient to raise a triable issue of fact and have no impact on this Court's conclusion that the Assignment resulted in a transfer of a portion of NWM's membership interest, which is a breach under the Amended Agreement.

As a result, this Court concludes that Shao is entitled to summary judgment as to liability on its cause of action for breach of the Amended Agreement. However, the Amended Agreement does not provide that any prohibited transfers shall be void.

Consequently, Shao is not entitled to a declaration that the Assignment and the Transfer Documents are invalid.

"[I]t has been consistently held that assignments made in contravention of a prohibition clause in a contract are void if the contract contains clear, definite and appropriate language declaring the invalidity of such assignments" (*Macklowe v 42nd St. Dev. Corp.*, 170 AD2d 388, 389 [1st Dept 1991]). "On the other hand, where the language employed constitutes merely a personal covenant against assignments, an assignment made in violation of such covenant gives rise only to a claim for damages against the assignor for violation of the covenant" (*id.*).

Accordingly it is,

ORDERED that the plaintiff's motion for summary judgment is granted in part, to the extent that summary judgment as to liability is granted on the plaintiff's first cause of action for breach of contract and denied in all other respects, and it is further

ORDERED and DECLARED that the plaintiff is not entitled to a [\*6]declaration that NWM's acts pursuant to the Assignment and the Transfer Documents are invalid, and it is further

ORDERED that the parties contact the Clerk of Part 53 and schedule a hearing to determine the amount of damages in conformity with this decision.

Dated:

---

J.S.C.

#### Footnotes

**Footnote 1:** The facts set forth herein are taken from the parties' Rule 19-A Statements of Undisputed Facts and the pleadings.

**Footnote 2:** Yung Hsing "Jimmy" Chou is not a party to this action and his 5% interest in Exceli is irrelevant for the purposes of this motion.

[ [Return to Decision List](#) ]